

Joint Committee on Attorney Standards 20090055

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Honorable Gerald W. Vandewalle
Chief Justice
North Dakota Supreme Court
600 E. Boulevard., Dept 180
Bismarck, ND 58505-0530

Re: Proposed Amendments - Rule 1.8, Rules of Professional Conduct, Regarding Attorneys Serving in a Dual Capacity

Dear Chief Justice Vandewalle:

In response to a referral from the Board of Governors, the Joint Committee on Attorney Standards has discussed possible responses to issues posed by an attorney who serves as both legal counsel and personal representative of an estate, guardian, conservator, or trustee. These issues were initially presented to the Board by a task force that studied the nature of attorney misappropriations.

The Joint Committee considered a number of responses to problems represented by attorneys serving in a dual capacity, including some form of court approval or supervision, some kind of reporting or auditing requirement, and a simple prohibition. The Committee solicited comments from the Real Property, Probate, and Trust Law Section. The Committee also obtained and reviewed background information from the ABA's Center for Professional Responsibility regarding how this issue may have been addressed in other jurisdictions. After review of the assembled information and several discussions, the Committee concluded that prohibiting attorneys from serving in both capacities is the better course. The Committee is mindful of the concern about the availability of legal services in rural areas and is aware that clients themselves often ask that an attorney serve in both capacities. However, matters of public protection, trust and confidence in the profession, and the risks of overreaching or other wrongdoing militate in favor of a prohibition. The Committee therefore proposes amendments to Rule 1.8 of the Rules of Professional Conduct (Conflicts of Interest: Prohibited Transactions) to establish the prohibition in a new paragraph (l) and to provide an accompanying Comment [22].

The Joint Committee voted unanimously to submit the proposed amendments to the Supreme Court, pending review and comment by the SBAND Board of Governors as required under Administrative Rule 38. The Board reviewed the amendments at its January meeting and supports the proposed amendments. I am pleased therefore to submit the amendments to the Supreme Court for its consideration.

If you should have any questions concerning the Joint Committee's submission, please contact me at your convenience.

Sincerely,



Michael G. Sturdevant, Chair
Joint Committee on Attorney Standards

MGS/
Attachment

cc: Penny Miller, Clerk of the Supreme Court
Jim Ganje

Rule 1.8, Rules of Professional Conduct - Proposed Amendments

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

1 (a) Except for standard commercial transactions involving products or services that the client
2 generally markets to others, a lawyer shall not enter into a business, financial, or property transaction
3 with a client unless:

4 (1) the transaction is fair and reasonable to the client; and

5 (2) after consultation, including advice to seek independent counsel, the client
6 consents to the transaction.

7 (b) Except as permitted or required in Rules 1.6 and 3.3, a lawyer shall not use information
8 relating to representation of a client to the disadvantage of the client unless after consultation,
9 including written advice to seek independent counsel, the client consents.

10 (c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the
11 lawyer any substantial gift from a client, including a testamentary gift, unless the client is related to
12 the donee. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent,
13 grandparent, or other relative or individual with whom the lawyer or the client maintains a close,
14 familial relationship.

15 (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate
16 an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial
17 part on information relating to the representation.

18 (e) A lawyer shall not provide financial assistance to a client in connection with pending or
19 contemplated litigation, except that:

20 (1) a lawyer may advance court costs and expenses of litigation, the repayment of
21 which may be contingent on the outcome of the matter;

22 (2) a lawyer representing an indigent client may pay court costs and expenses of
23 litigation on behalf of the client; and

24 (3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand

1 delay in litigation that would otherwise put substantial pressure on the client to settle
2 a case because of financial hardship rather than on the merits, provided that the client
3 remains ultimately liable for repayment of the loan without regard to the outcome of
4 the litigation and, further provided that no promise of financial assistance was made
5 to the client by the lawyer, or by another in the lawyer's behalf, prior to the
6 employment of that lawyer by the client.

7 (f) A lawyer shall not accept compensation for representing a client from one other than the
8 client unless:

9 (1) there is no interference with the lawyer's independence of professional judgment
10 or with the client-lawyer relationship;

11 (2) information relating to representation of a client is protected as required by Rule
12 1.6; and

13 (3) after consultation, the client consents.

14 (g) A lawyer who represents two or more clients, other than in class actions, shall not
15 participate in making an aggregate settlement of the claims of or against the clients, or an aggregated
16 agreement as to guilty pleas in a criminal case, unless, after consultation, including disclosure of the
17 existence and nature of all the claims or pleas involved and of the participation of each person in the
18 settlement, each client consents.

19 (h) A lawyer shall not:

20 (1) make an agreement prospectively limiting the lawyer's liability to a client for
21 malpractice unless the client is independently represented in making the agreement;

22 or

23 (2) settle a claim or potential claim for the lawyer's liability for malpractice with an
24 unrepresented client or former client unless, after consultation, including advice to
25 seek independent counsel, the client or former client consents.

26 (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter
27 of litigation the lawyer is conducting for a client, except that the lawyer may:

28 (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

1 (2) contract with a client for a contingent fee in a civil case as permitted by Rule 1.5.

2 (j) A lawyer shall not have sexual relations with a client unless a consensual sexual
3 relationship existed between them when the client-lawyer relationship commenced.

4 (k) A part-time prosecutor or judge permitted by law to engage in the practice of law in
5 addition to the part-time service shall not, in that practice, represent a client if the representation will
6 or probably will require any pleading or appearance on the client's behalf:

7 (1) if the lawyer is a part-time prosecutor and the client is charged or expects to be
8 charged with a crime, in the jurisdiction in which the lawyer holds the prosecutorial
9 appointment; and

10 (2) if the lawyer is a part-time judge in:

11 (i) the court in which the judge holds appointment; or

12 (ii) any court from which appeals may be brought to the court in
13 which the judge holds appointment.

14 (l) Neither a lawyer serving as a fiduciary of an estate, trust, or conservatorship nor the
15 lawyer's firm may serve as legal counsel for the fiduciary. This paragraph does not apply to matters
16 in which the decedent, trustor, beneficiary, or protected person is a spouse, child, grandchild, parent,
17 grandparent, or sibling of the lawyer.

18 **Comment**

19 **Client Consent and Advice to Seek Independent Counsel**

20 [1] There are several requirements under this Rule that the lawyer obtain client consent or
21 provide advice to the client to seek independent counsel. See Paragraphs (a)(2), (b), (g), and (h)(2).
22 Obtaining client consent or providing advice to seek independent counsel in writing is the preferred
23 practice. Lack of a writing may make it difficult to prove client consent or that advice was given if
24 a dispute arises later.

25 **Business Transactions Between Client and Lawyer**

26 [2] A lawyer's legal skill and training, together with the relationship of trust and confidence
27 between lawyer and client, create the possibility of overreaching when the lawyer participates in a
28 business, property or financial transaction with a client, for example, a loan or sales transaction or

1 a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when
2 the transaction is not closely related to the subject matter of the representation, as when a lawyer
3 drafting a will for a client learns that the client needs money for unrelated expenses and offers to
4 make a loan to the client. This Rule applies to lawyers engaged in the sale of goods or services
5 related to the practice of law, for example, the sale of title insurance or investment services to
6 existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing
7 property from estates they represent. It does not apply to ordinary fee arrangements between client
8 and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer
9 accepts an interest in the client's business or other nonmonetary property as payment of all or part
10 of a fee. This Rule does not apply to standard commercial transactions between the lawyer and the
11 client for products or services that the client generally markets to others. For example, in banking
12 or brokerage services, medical services, products manufactured or distributed by the client, and
13 utilities services, the lawyer has no advantage in dealing with the client; therefore, the restrictions
14 in paragraph (a) are unnecessary and impracticable.

15 [3] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its
16 essential terms be communicated to the client in a manner that can be reasonably understood.
17 Paragraph (a)(2) requires that the client also be advised of the desirability of seeking the advice of
18 independent legal counsel and requires the lawyer to obtain the client's consent. When necessary,
19 the lawyer should discuss both the material risks of the proposed transaction, including any risk
20 presented by the lawyer's involvement, and the existence of reasonably available alternatives and
21 should explain why the advice of independent legal counsel is desirable.

22 [4] The risk to a client is greatest when the client expects the lawyer to represent the client
23 in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that
24 the lawyer's representation of the client will be materially limited by the lawyer's financial interest
25 in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the
26 requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the
27 lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and
28 participant in the transaction, such as the risk that the lawyer will structure the transaction or give

1 legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the
2 lawyer must obtain the client's consent. In some cases, the lawyer's interest may be such that Rule
3 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

4 [5] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule
5 is inapplicable. The fact that the client was independently represented in the transaction is relevant
6 in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1)
7 further requires.

8 **Use of Information Related to Representation**

9 [6] Use of information relating to the representation to the disadvantage of the client violates
10 the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the
11 lawyer or a third person, such as another client or business associate of the lawyer. For example, if
12 a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may
13 not use that information to purchase one of the parcels in competition with the client or to
14 recommend that another person make such a purchase. This Rule allows uses that do not
15 disadvantage the client. For example, a lawyer who learns a government agency's interpretation of
16 trade legislation during the representation of one client may properly use that information to benefit
17 other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client
18 gives consent, after advice to seek independent counsel. See Rules 1.6, 1.9(c), 8.1, and 8.3.

19 **Gifts to Lawyers**

20 [7] A lawyer may accept a gift from a client, if the transaction meets general standards of
21 fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation
22 is permitted. In any event, due to concerns about overreaching and imposition on clients, a lawyer
23 may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where
24 the lawyer is related to the client as set forth in paragraph (c).

25 [8] If effectuation of a substantial gift requires preparing a legal instrument such as a will or
26 conveyance that legal instrument must be prepared by a different lawyer under a separate
27 representation. The sole exception to this Rule is where the client is a relative of the donee.

28 [9] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or

1 associate of the lawyer named as executor of the client's estate or to another potentially lucrative
2 fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest
3 provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the
4 appointment will materially limit the lawyer's independent professional judgment in advising the
5 client concerning the choice of an executor or other fiduciary. In obtaining the client's consent to the
6 conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial
7 interest in the appointment, as well as the availability of alternative candidates for the position.

8 **Literary Rights**

9 [10] An agreement by which a lawyer acquires literary or media rights concerning the
10 conduct of the representation creates a conflict between the interests of the client and the personal
11 interests of the lawyer. Measures suitable in the representation of the client may detract from the
12 publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer
13 representing a client in a transaction concerning literary property from agreeing that the lawyer's fee
14 shall consist of a share in ownership in the property, if the arrangement conforms to Rules 1.5 and
15 1.7.

16 **Financial Assistance to Client**

17 [11] Rule 1.8(e) recognizes the impact of finances on a client's access to the judicial system
18 and provides limited avenues to improve the client's financial ability to be represented by counsel
19 through negotiation or litigation or both without undue financial pressure to settle prematurely. This
20 provision is not to be interpreted as requiring lawyers to provide financial assistance to clients.

21 **Person Paying for Lawyer's Service**

22 [12] Lawyers are frequently asked to represent a client under circumstances in which a third
23 person will compensate the lawyer, in whole or in part. The third person might be a relative or friend,
24 an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along
25 with one or more of its employees). Because third-party payers frequently have interests that differ
26 from those of the client, including interests in minimizing the amount spent on the representation
27 and in learning how the representation is progressing, lawyers are prohibited from accepting or
28 continuing such representations unless the lawyer determines that there will be no interference with

1 the lawyer's independent professional judgment, and there is consent from the client. See also Rule
2 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends,
3 employs or pays the lawyer to render legal services for another).

4 [13] Sometimes, it will be sufficient for the lawyer to obtain the client's consent regarding
5 the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement
6 creates a conflict of interest for the lawyer, the lawyer must comply with Rule 1.7. The lawyer must
7 also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7, a conflict
8 of interest exists if there is significant risk that the lawyer's representation of the client will be
9 materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's
10 responsibilities to the third-party payer (for example, when the third-party payer is a co-client). The
11 lawyer may accept or continue the representation with the consent of each affected client only if the
12 conflict is one described in Rule 1.7(c).

13 **Aggregate Settlements**

14 [14] Differences in willingness to make or accept an offer of settlement are among the risks
15 of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the
16 risks that should be discussed before undertaking the representation as part of the process of
17 obtaining the clients' consent. In addition, Rule 1.2(a) protects each client's right to have the final say
18 in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty
19 or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both
20 these Rules and provides that, before any settlement offer or plea bargain is made or accepted on
21 behalf of multiple clients, the lawyer must inform each client about all the material terms of the
22 settlement, including what the other clients will receive or pay if the settlement or plea offer is
23 accepted. Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively,
24 may not have a full client-lawyer relationship with each member of the class; nevertheless, such
25 lawyers must comply with applicable rules regulating notification of class members and other
26 procedural requirements designed to ensure adequate protection of the entire class.

27 **Limiting Liability and Settling Malpractice Claims**

28 [15] An agreement prospectively limiting a lawyer's liability for malpractice is prohibited

1 unless the client is independently represented in making the agreement because it is likely to
2 undermine competent and diligent representation. Also, many clients are unable to evaluate the
3 desirability of making such an agreement before a dispute has arisen, particularly if they are then
4 represented by the lawyer seeking the agreement. Paragraph (h) does not, however, prohibit a lawyer
5 from entering into an agreement with the client to arbitrate legal malpractice claims, provided such
6 agreements are enforceable and the client is fully informed of the scope and effect of the agreement.
7 Nor does this paragraph limit the ability of lawyers to practice in the form of a limited liability entity,
8 where permitted by law, provided that each lawyer remains personally liable to the client for his or
9 her own conduct and that the firm complies with any conditions required by law, such as provisions
10 requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an
11 agreement in accordance with Rule 1.2 that defines the scope of the representation, although a
12 definition of scope that makes the obligations of representation illusory will amount to an attempt
13 to limit liability.

14 [16] Agreements settling a claim or a potential claim for malpractice are not prohibited by
15 this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an
16 unrepresented client or former client, the lawyer must first advise such a person of the
17 appropriateness of independent representation in connection with such a settlement. In addition, the
18 lawyer must give the client or former client a reasonable opportunity to find and consult independent
19 counsel.

20 **Acquiring Proprietary Interest in Litigation**

21 [17] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring
22 a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law
23 champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the
24 representation. In addition, when the lawyer acquires an ownership interest in the subject of the
25 representation, it will be more difficult for a client to discharge the lawyer if the client so desires.
26 The Rule is subject to specific exceptions developed in decisional law and continued in these Rules.
27 The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition,
28 paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses

1 and contracts for reasonable contingent fees. When a lawyer acquires by contract a security interest
2 in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition
3 is a business or financial transaction with a client and is governed by the requirements of paragraph
4 (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

5 **Lawyer-Client Sexual Relationships**

6 [18] The relationship between lawyer and client is a fiduciary one in which the lawyer
7 occupies the highest position of trust and confidence. The relationship is almost always unequal;
8 thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's
9 fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to
10 the client's disadvantage. In addition, such a relationship presents a significant danger that, because
11 of the lawyer's emotional involvement, the lawyer will be unable to represent the client without
12 impairment of the exercise of independent professional judgment. Moreover, a blurred line between
13 the professional and personal relationships may make it difficult to predict to what extent client
14 confidences will be protected by the attorney-client evidentiary privilege, since client confidences
15 are protected by privilege only when they are imparted in the context of the client-lawyer
16 relationship. Because of the significant danger of harm to client interests and because the client's own
17 emotional involvement renders it unlikely that the client could give adequate consent, this Rule
18 prohibits the lawyer from having sexual relations with a client regardless of whether the relationship
19 is consensual and regardless of the absence of prejudice to the client.

20 [19] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues
21 relating to the exploitation of the fiduciary relationship and client dependency are diminished when
22 the sexual relationship existed prior to the commencement of the client-lawyer relationship.
23 However, before proceeding with the representation in these circumstances, the lawyer should
24 consider whether the lawyer's ability to represent the client will be materially limited by the
25 relationship. See Rule 1.7.

26 [20] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the
27 organization (whether inside counsel or outside counsel) from having a sexual relationship with a
28 constituent of the organization who supervises, directs or regularly consults with that lawyer

1 concerning the organization's legal matters.

2 **Law Practice by Part-Time Prosecutors and Part-Time Judges**

3 [21] Part-time prosecutors or part-time judges permitted by law to practice in addition to the
4 part-time service must not engage in matters that compromise their public functions. This rule
5 identifies the circumstances in which the public function would be compromised. No compromise
6 of the public function exists when a part-time municipal prosecutor or judge defends persons charged
7 with crime to be tried in another court, or when a part-time state's attorney defends a person charged
8 with a crime to be tried in another county. Persons associated in the practice of law with a part-time
9 prosecutor or judge may not, of course, take on a representation denied to the part-time official by
10 this Rule. See Rule 1.10. Other considerations may prohibit a part-time judge or prosecutor, or
11 another lawyer associated with the part-time official in practice, from accepting or combining
12 representations not specifically prohibited by this Rule. For instance, even though a matter will be
13 defended in a court other than the one which the part-time official serves, that matter may not be
14 undertaken if it involves parties or issues with which the part-time official had any involvement as
15 a judge or prosecutor.

16 **Lawyer as Fiduciary - Prohibition on Serving as Counsel**

17 [22] Paragraph (1) addresses situations in which a lawyer may be asked to serve as both a
18 fiduciary for an estate, trust, or conservatorship and as legal counsel for the requesting party.
19 Situations in which a lawyer serves in both capacities represent a conflict of interest and present,
20 whether by design or default, opportunities for overreaching, misappropriation, or other exploitation
21 of the dual capacity relationship. The relationship of trust and confidence between lawyer and client
22 and with respect to the lawyer as fiduciary generally requires that a lawyer not serve in both
23 capacities. The prohibition in paragraph (1) would not apply to those situations in which there is a
24 familial relationship between the lawyer and the decedent, trustor, beneficiary, or protected person.

25 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
26 Committee on 09/13/84, 10/19/84, 12/14/84, 02/08/85, 03/11/85, 04/26/85, 08/23/85, 09/20/85,
27 01/10/86, 01/31/86 and 03/15/86; Minutes of the Joint Committee on Attorney Standards on

Amended effective ~~August 1, 2006~~

1 02/28/03, 09/25/03, 11/14/03, 04/16/04, 08/06/04, 11/19/04, 06/14/05, 09/09/05, 06/10/08, 09/19/08,
2 11/07/08, 12/01/08.